2001-014-872

SOCIETY FOR HUMAN RESOURCE MANAGEMENT

July 5, 2001

General Services Administration
FAR Secretariat (MVR)
1800 F Street, N.W.
Room 4035
ATTN: Laurie Duarte
Washington, D.C. 20405

RE: FAR Case 2001-014

Dear Ms. Duarte:

On behalf of the more than 165,000 members of the Society for Human Resource Management (SHRM), SHRM submits the following comments regarding the proposed rule issued by the Federal Acquisition Regulatory Council (FAR Council) on April 3, 2001 to repeal the final rule addressing contractor responsibility (published on December 20, 2000 in the Federal Register at 65 FR 80255), hereinafter referred to as the "final rule."

STATEMENT OF INTEREST

The Society for Human Resource Management (SHRM) is the leading voice of the human resource profession. SHRM provides education and information services, conferences and seminars, Government and media representation, online services and publications to more than 165,000 professional and student members throughout the world. The Society, the world's largest human resource management association, is a founding member of the North American Human Resource Management Association (NAHRMA) and a founding member of the World Federation of Personnel Management Associations (WFPMA).

SHRM members provide human resource guidance and advice to the businesses with which they are associated, including federal contractors who contract with the Department of Defense, the General Services Administration and the National Aeronautics and Space Administration. It is SHRM members who would be key to complying with employment and labor laws and facilitating the certification the NPRM would require.

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SHRM would also like to endorse and support the comments provided to the General Services Administration (GSA) by the National Alliance Against Blacklisting (NAAB). We provide here comments on areas of particular concern to SHRM and its members relating to the provisions impacting labor and employment laws. In doing so, SHRM does not suggest agreement with the proposed blacklisting of federal contractors for alleged failures of satisfactory compliance with tax, environmental, antitrust or consumer protection laws but leave comments on those matters to persons and organizations with expertise in those areas.

EXECUTIVE SUMMARY

The members of SHRM are fully committed to meeting the myriad requirements of labor and employment law in today's workplace. As experienced and trained professionals, they spend their work lives advising and guiding U.S. businesses to ensure lawful and safe employment practices. SHRM fully supports the repeal of the final rule regarding contractor responsibility. The final rule erroneously allows untrained and inexperienced federal COs to make credibility and evidentiary determinations and to disqualify any company considered to have violated a labor or employment law, and therefore should be repealed.

SHRM believes that the final rule should be repealed because it takes federal procurement practices in a direction that is exactly contrary to recent reform initiatives which are more in line with commercial practices that facilitate greater private sector participation.[1] While it is a worthy goal to increase an employer's compliance with laws and regulations, the changes made by the final rule threaten fair, full and open competition in federal contracting – severely impacting the approximately 300,000 corporations, small businesses, colleges and universities, hospitals, charities, research centers and other organizations who contract with the Federal Government.

In addition, the final rule impermissibly created additional remedies beyond those legislated by Congress in the labor and employment statutes at issue. Such additions are beyond the authority of the FAR Council or COs and will almost surely be subject to legal challenge. Indeed, the final rule inappropriately authorizes a CO to disqualify a contractor before a Final Agency Decision were issued on an alleged employment and labor law violation and well before the contractor had the opportunity to exercise its First Amendment right to appeal a Final Agency Decision to the courts. The momentary political advantage that might be gained by the final rule will not survive the long-term damage to the procurement process.

The final rule's changes to the cost principles are also problematic and without sound justification. In this regard, SHRM notes specifically that the final rule's disallowance in FAR Part 31.205-21 of certain labor relations costs associated with union organizing campaigns are

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[1] See competition in Contacting Act, Pub. L. No. 98-369; Federal Acquisition Streamlining Act, Pub. L. No. 103-355; Clinger-Cohen Bill, Pub. L. No. 104-106.

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specifically authorized by the National Labor Relations Act, 29 U.S.C. § 158(c) ("NLRA"), and the First Amendment and cannot legitimately be disallowed without interfering with a contractor's legitimate statutory and constitutional rights.

COMMENTS

I. FAR PART 9, CONTRACTOR RESPONSIBILITY

A. The Final Rule Inappropriately Expands the Responsibilities of Contracting Officers.

The final rule turns COs into auxiliary law enforcement personnel with "jurisdiction" over an incredibly broad swath of law: they would declare ineligible any federal contractor with less than satisfactory compliance with laws governing labor and employment, tax, the environment, antitrust and consumer protections. There is no justification for such an expansion of CO responsibilities and many reasons why it would be irresponsible.

Current law and regulation required a CO to award federal contracts to "responsible" contractors.[2] The FAR lists seven factors to guide a CO, which include a satisfactory performance record and a satisfactory record of integrity and business ethics.[3] In making this determination, a CO must resolve on a *case by case* basis whether the contractor has the present ability and capacity to perform *only* the proposed contract. This is already a relatively subjective standard and the CO has wide discretion. However, the overriding threshold question is whether a prospective contractor has the ability, resources, and willingness to deliver goods and services to the Federal Government.

The nature of the inquiry intended by the FAR requirement that a contractor demonstrate "integrity and business ethics" is represented by Part 9-104.3. This section applys the terms in their common sense and traditional meaning, *i.e.*, to address fraud, crimes and conspiracies, and in a manner that is consistent with their meaning in the FAR over the years. It is an entirely different matter to assert that a violation of one of any number of employment laws demonstrates that a contractor lacks integrity or ethical behavior. Stretched into this new arena, the terms "integrity" and "business ethics" lose their meaning altogether and lose their ability to guide decisionmaking by COs or to predict qualification for federal contracting.

Without repeal, the final rule will add to a CO's responsibility by affirmatively requiring a CO to include in its responsibility determination whether a contractor is in "satisfactory compliance" with federal, state, local, municipal, and foreign labor and employment laws,

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2 FAR .9 103(a).

3 FAR .9.104-1 (a)-(g)

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among others.[4] In making this determination, the CO is free to "consider all relevant credible information," putting the CO in the place of a formal adjudicator as to whether a violation of a labor or employment law may have occurred. Indeed, the final rule provides that a CO must consider unreviewed decisions of Administrative Law Judges and allows COs to consider administrative complaints.

This approach contains two basic flaws. First, COs are neither trained nor experienced to take on the task of determining "satisfactory compliance" with the myriad of labor and employment laws that govern the modern workplace. Second, the proposed regulation carefully fails to provide meaningful guidance in making these determinations and leaves prospective contractors to deal with the idiosyncrasies of what individual COs believe is relevant and credible. Both problems are fatal in the critical and high-stakes world of federal contracting.

COs are experts in the maze of federal contract regulations. That said, the final rule assumes that COs are also experts in all other areas of law governing the workplace. A quick, but not exhaustive review of just federal labor, employment and consumer protection laws exceeds 70 different federal statutes.[5] Such a review does not account for the countless rules and

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[4] 65 Fed. Reg. 80,256 (2000) Part 9 – Contractor Qualifications.

[5] The Fair Labor Standards Act of 1938 (FLSA); The Walsh-Healy Act of 1936, The Contract Work Hours and Safety Standard Act; Title VII of the Civil Rights Act of 1964; The Equal Pay Act of 1963; The Age Discrimination in Employment Act (ADEA); Executive Order 11246; The Vietnam-Era Veteran's Readjustment Assistance Act (VEVRAA); The Uniformed Services' Employment and Reemployment Rights Act (USERRA); The Americans with Disabilities Act (ADA); The Rehabilitation Act of 1973; The Railway Labor Act of 1926, The National Labor Relations Act of 1935 (NLRA): The Wagner Act; The Labor-Management Reporting and Disclosure Act; The Employee Retirement Income Security Act of 1974 (ERISA); The Health Insurance Portability and Accountability Act (HIPAA); The Newborns' and Mothers Health Protection Act (NMHPA); The Mental Health Parity Act of 1999 (MHPA); The Consolidated Omnibus Budget Reconciliation Act (COBRA); The Family and Medical Leave Act (FMLA); The Occupational Safety and Health Act; The Immigration and Nationality Act; The Employee Polygraph Protection Act of 1988 (EPPA); The Drug Free Workplace Act; The Personal Responsibility and Work Opportunities Act; The Worker Adjustment and Retraining Notification Act (WARN); The Federal Insurance Contributions Act (FICA); The Immigration Reform and Control Act of (IRCA) 1986; Internal Revenue Code; The Federal Unemployment Tax Act (FUTA); The Federal Income Tax Code; The Clean Air Act; The Federal Water Pollution Control Act (FWCPA; The Safe Drinking Water Act (SDWA); The Toxic Substances Control Act (TSCA); The Resource Conservation and Recovery Act (RCRA), The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); The Emergency Planning and Community Right-to-Know Act; The Davis-Beacon Act of 1931; Executive Order 12564; The Landrum-Griffin Act of 1959; The Norris-LaGuardia Act of 1932; The Taft-Hartley Act of 1947; The Tax Reduction Act Stock Ownership Plan (TRASOP); The Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA); The Tax Reform Act of 1986; The Small Business Programs Reauthorization and Amendments Act of 1997; The Small Business Investment Company Technical Corrections Act of 1998; The Small Business Credit Efficiency Act of 1995; The Small Business Programs Improvement Act of 1996, The Black Lung Benefits Act; The Omnibus Reconciliation Act (OBRA); The Federal Wage Garnishment Law; The Small Business Job Protection Act of 1996 (SBJPA); The Job Training Partnership Act of 1973; The Federal Acquisition Streamlining Act of 1994 (FASA); The Federal Acquisition Reform Act of 1995 (FARA); The Age Discrimination Act of 1975; The Copeland "Anti-Kickback" Act of 1934; The Service Contract Act of 1965; The Wage Garnishment Act of 1968; The Fair Credit Reporting Act of 1970; The Securities

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regulations associated with each statute or the hundreds of additional state, municipal and foreign statues regulating workplaces. In FY98, the Equal Employment Opportunity Commission (EEOC) received over 79,000 complaints alleging violations of the four statutes it enforces.[6] The National Labor Relations Board (NLRB) receives about 35,000 complaints annually alleging violations of the NLRA.[7] These are but two areas of federal labor and employment law. Yet the final rule contemplates that a CO, as part of its responsibility determination, is required to inquire into, and weigh in the balance, each and every employment discrimination and labor complaint filed against a federal contractor. Who is going to train COs on these requirements?

As the leading association for HR professionals, SHRM goes to great lengths to ensure its members are well educated on and in full compliance with the many laws affecting the workforce. A significant portion of SHRM members have devoted their entire careers to working within the human resource profession and with these laws. SHRM continually offers educational seminars and conferences to help its members keep abreast of the constant changes to employment and labor laws and regulations. HR professionals can attest personally from experience that it is a constant struggle to remain current with these laws and regulations.

It is also a mistake to authorize untrained and inexperienced CO to weigh "satisfactory compliance" with the breadth of human resource laws and regulations, especially as this evaluation would not be limited to final non-appealable decisions. The final rule suggests that coordination with "agency counsel" is intended to solve this problem. It does not. Rather, the final rule lacks any process to ensure efficiency in government contracting and fairness to government contractors. First, who is "agency counsel" – a lawyer within the contracting agency (who also would have no expertise in laws beyond the agency's business) or a lawyer at the agency with expertise, such as DOL or the NLRB or EEOC? Who has the final say on contractor qualifications – the CO or the unidentified "agency counsel?" What process is envisioned by which a CO may request advice from "agency counsel" – would the contractor be alerted to the request for advice? Would the contractor have an opportunity to submit its own statements on eligibility? Resort to advice from "agency counsel" at the NLRB or EEOC would only interject the procurement process into the decisions at other agencies and destroy the government's traditional neutrality on labor matters. In sum, requiring COs to assume such new and heightened obligations will only serve to substantially overburden the procurement process and inevitably lead to arbitrary and uneven decisions and legitimate contractor challenges. Therefore, the final rule should be repealed.

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and Exchange Act of 1934; The Social Security Act of 1935; The Health Maintenance Organization Act of 1973; The Pregnancy Discrimination in Employment Act of 1978; The Revenue Act of 1978; The Consumer Credit Protection Act; The Retirement Equity Act of 1984 (REA); The Personal Responsibility and Work Opportunity Act (Welfare Reform).

6 *See* http://www eeoc.gov/stats/all html.

7 *See* http://www.nlrb.gov/facts.html.

The lack of standards to guide the CO's discretion is no less troubling. Neither an administrative complaint nor an unreviewed decision by an Administrative Law Judge constitutes a "final" decision that a contractor has violated the law but both are identified as legitimate bases on which to disqualify a contractor. At best, a complaint means that a Government employee has decided there is "reasonable cause to believe" a violation *may* have occurred. *See, inter alia,* 29 U.S.C. § 160(l) ("if, after investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue . . . ."). Just as clearly, the alleged violation may *not* have occurred and the complaint may be withdrawn or dismissed. The status of ALJ decisions runs the gamut from agency to agency,[8] but in all cases such decisions are subject to further judicial review. It is highly inappropriate to substitute an untrained CO's determination that a violation *did* occur, in the middle of litigation and before a contractor has exercised its rights of appeal which could result in a dismissal of a complaint or a reversal of an initial decision.

SHRM members deal daily with the varieties of legal obligations and allegations of wrong-doing that are imposed by modern employment law. They can attest that cases alleging discrimination or unfair labor practices are extraordinarily fact specific. Success or failure of a case can turn on one fact issue that can take months or years to substantiate or verify. The final rule provides no assurances that different COs will apply the same tests and analyses and, in fact, it is almost certain that they will not. What is likely to happen is that (i) the Federal Government will base decisions on federal contract eligibility on unsubstantiated facts and allegations and (ii) federal contractors will challenge such decisions. A slow, cumbersome and expensive procurement process is sure to result.

B. The Final Rule Conflicts With Superior Federal Law.

Congressional history clearly establishes Congress' intent to limit debarment and/or suspension to compliance with specific laws. Federal statutes such as the Davis Bacon Act, the Service Contract Act and the Work Hours and Safety Standards Act specifically address eligibility for federal contracts. Moreover, the FAR, with congressional authority, defines "ineligible" those contractors who violate the "Davis-Bacon Act ... Service Contract Service Act, the Equal Employment Opportunity Acts ... the Walsh Healey Public Contracts Act, the Buy American Act, or the Environmental Acts ...."[9] Each of these statutes is reflected in specific contract clauses, as applicable, so that a breach of the statutory obligation also

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[8] For instance, an ALJ at the National Labor Relations Board merely issues a "recommended" decision while an ALJ under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, issues a decision that will become a final agency unless the Federal Mine Safety and Health Review Commission grants a discretionary petition for review.

[9] FAR .9.403. See also FAR .22.809 (stating the Office of Federal Contract Compliance Programs (OFCCP) can place firm on suspension and debarment last for failure to comply with equal opportunity clause of federal contract).

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constitutes a breach of the federal contract.[10] Therefore, it is clear that prior to the final rule, the procurement system already addressed those employment statutes which Congress has determined should be included in the debarment/suspension process. Congress has not authorized debarment or suspension as a remedy for alleged violations of the remaining labor and employment laws covered by the final rule – such as violations of the NLRA, the Fair Credit Reporting Act (FCRA), the Employee Retirement Income Security Act (ERISA), the Family and Medical Leave Act (FMLA), or others.

Attempts to accomplish legislatively what the final rule does administratively are not new to Congress and have routinely failed.[11] In 1999, Representative Lane Evans (D-IL) and Senator Richard Durbin (D-IL) each introduced legislation in their respective chambers to allow the Secretary of Labor to debar contractors for various alleged violations of certain labor and safety laws.[12] The National Labor Reform Act of 1977, which was not enacted, would have provided that "willful" violators of the NLRA would be suspended from federal contracting for three years. None of this legislation gained majority support or, recently, any serious attention.

Nonetheless, only Congress – and not administrators – has authority to add remedies to federal statutes. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) ("The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes."). Without an amendment to the underlying statutes, the FAR Council is preempted in its efforts to add remedies to them. *See, e.g.*, *Wisconsin Dep't of Indus. v. Gould Inc.*, 475 U.S. 282, 106 S. Ct. 1057 (1986) (Wisconsin statute debarring state contractors after three violations of NLRA preempted). *See also*, *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1337 (D.C. Cir. 1996) ("No state or federal official or Government entity can alter the delicate balance of bargaining and economic power that the NLRA establishes, whatever his or its purpose may be."); *Van Hoomissen v. Xerox Corporation*, 368 F. Supp. 829 (1973), *appealed on other grounds,* 497 F.2d 180 (1974 (denial of intervention); *appealed on other grounds*, 503 F.2d 1131 (9th Cir. 1974 (attorney's fees) (congressional action required before punitive damages might be awarded under Title VII; courts unable to do what Congress chose not to do).

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[10] Notably, a federal contractor may be suspended or debarred for violations of these statutes and provisions only *after* it becomes a federal contractor and *after* it signs a contract containing the relevant clauses. The final rulewould invert this process and disqualify bidders *before* they ever signed a federal contract.

[11] S. 1530, 103rd Cong., 1st Sess. (1993) (proposing to amend the NLRA to require debarment for violators of labor relations provisions); *see also* H.R. 1624, 105th Cong., 1st Sess. (1997) and S. 1098, 105th Cong., 1st Sess. (1997).

[12] H.R. 1227, 106th Cong., 1st Sess. (1999); S 1339, 106th Cong , 1st Sess (1999) (allowing Secretary of Labor to debar or suspend federal contractor for violations of NLRA, the Fair Labor Standards Act, the Occupational Safety and Health Act, or 38 U.S.C. § 4212(a)).

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The final rule creates a direct conflict with statutory law. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 79 S. Ct. 773 (1959), forbids regulation of activities that constitute unfair labor practices and preserves such determinations to the exclusive authority of the NLRB with review by the courts of appeals and U.S. Supreme Court. Under *Garmon*, the final rule's allowance of COs to unilaterally decide whether an NLRB complaint has merit or an unreviewed ALJ decision is correct, and then would remedy these supposed violations through disqualification, conflicts with the NLRA (and, by extension, Title VII, and other labor and employment laws that specify and limit their enforcement and remedies) and is prohibited.[13] In this regard, the FAR Council is similarly barred from augmenting NLRA remedies even if its proposal were to require disqualification only for final non-appealable findings against a contractor. *See Wisconsin v. Gould, supra.*

Congress has authorized the disqualification of contractors only by those federal agencies best suited to make those decisions. For example, violations of certain prevailing wage laws (*e.g.* Davis-Bacon Act) or environmental laws (*e.g.* Clean Air Act), can cause the appropriate enforcement agency (the Department of Labor (DOL) or the Environmental Protection Agency (EPA) respectively) to disqualify a contractor.[14] Under the regime imposed by the final rule, every CO in DOD, GSA and NASA may have preemptive power to disqualify a contractor for an alleged breach of labor and employment laws, among others. A CO could, for instance, disqualify a contractor for a matter DOL had already determined did not warrant suspension or debarment. Clearly, it is inconsistent with the congressional intent and the *statutory* authority of other agencies for the FAR Council to attempt to grant such expansive and unwarranted and unnecessary authority *administratively*.

The changes made to the federal procurement process made by the final rule, ignore the fact that Congress has never passed legislation to support its proposal. In fact, Congress has specifically rejected attempts to accomplish these purposes through the correct legislative channels. Instead, Congress has established specific, carefully balanced remedies for violations of these laws. The effort to use the administrative process to amend statutory law conflicts with congressional authority and should be abandoned. As such, repeal of the final rule is necessary to make the federal procurement process consistent with congressional intent and authority.

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[13] A second type of NLRA preemption was described by the Supreme Court in *Lodge 76, International Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 96 S. Ct. 2548 (1976). *Machinists'* preemption prohibits regulation of areas intended by Congress to be controlled only by the free play of economic forces. As described below, *Machinists* preemption bars the cost regulations proposed by the NPRM.

[14] *See also* FAR .9.104-3(e)(referring small business matters to the Small Business Administration).

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C. The Final Rule Contravenes the Public Policy that Government Shall Remain Neutral on Labor Relations Issues.

Official federal policy specifically states the Government shall remain neutral in labor disputes. The FAR specifies that "agencies shall remain impartial concerning any dispute between labor and contractor management and not undertake the conciliation, mediation, or arbitration of a dispute."[15] This policy position is not surprising: the NLRA grants exclusive authority over labor law violations to the NLRB and specifically grants the parties wide freedom of action and contract without Federal or State involvement.

The final rule changes this neutral policy on labor relations by requiring a CO to determine the merits of labor disputes. Given that a CO lacks experience to ferret out independent evidence on "satisfactory compliance" with labor law, a CO would inevitably rely on whatever he or she considered "relevant credible information" – exposing a contractor to disqualification due to strategic but unfounded unfair labor practice charges which may be filed during an organizing campaign to pressure a contractor to recognize a union without an election.[16] There is also an incentive for business competitors, disgruntled former employees and others to unfairly target contractors for purposes having nothing to do with the ability to perform a federal contract. This departure from the proper and long-standing policy of neutrality during labor relations disputes could particularly injure small business concerns. Without resources to sustain itself, a small business might be forced to immediately capitulate to union demands at the first whisper of pressure on a CO to disqualify the contractor. This is no small problem: in fiscal year 1998, small businesses were awarded more than 33 billion dollars in Government contracts.[17]

D. The Final Rule Violates Contractors' Due Process Rights.

The expansion of the meaning of "a satisfactory record of integrity and business ethics" does nothing to clarify current law and would unnecessarily complicate federal procurement. Part 9 of the FAR already prohibits the award of Government contracts to companies with irresponsible or unethical business practices. Significantly, however, it also provides contractors with specific due process safeguards such as short-term notice and an explanation prior to suspension, and long-term notice and a hearing process prior to debarment. Unfortunately, the final rule can be applied arbitrarily and without due process, resulting in nonproductive and inefficient litigation.

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15 FAR .22.101-1(b)(1).

16 This is not an imaginary concern and would appear to be consistent with the intentions of the final rule to advance union interests by disqualifying a contractor for any type of alleged NLRA violation and by refusing to allow the costs of responding to the union campaign.

17 See http://www.house gov/smbiz/hearing/106th/1999/991021/talent.html (Statement by Jim Talent, Chairman of House Small Business Committee, October 21, 1999).

The final rule instructs COs to give "*greatest* weight to decisions within the past three years" but does not actually limit the time period for assessment of a contractor's labor and employment history. There is no evidentiary standard for "all relevant credible information." The term could represent a very high standard (beyond a reasonable doubt) or a very low standard (just enough to persuade the individual contracting officer). In either case, idiosyncratic and inconsistent (and therefore arbitrary) decisionmaking will result. The combination of unlimited time periods and missing definitions or standards renders the final rule arbitrary and capricious and therefore should be repealed.

SHRM recognizes what the FAR Council does not: No company is protected from lawsuits, whether worthy or frivolous. In SHRM"s 1999 *Employment Practices Liability Survey*, more than half of the respondents' organizations have been named in at least one employment-related lawsuit in the past five years.[18] Alleged violations do not establish a company's "willingness or capability" to comply with the law. The Federal Government has over 28,000 employment discrimination charges filed against it.[19] Yet no one is arguing the Federal Government is irresponsible or is not in "satisfactory compliance" with the law.

The final rule also provides strong incentives for unions, environmental activists, consumer groups, plaintiff's attorneys, and business competitors to unfairly target prospective contractors in efforts to show "credible information" of noncompliance with federal law.

Without a clear and appropriate standard, it is arbitrary to grant a CO *carte blanche* authority to base contract awards on mere allegations of wrongdoing. If a contractor were eliminated because a CO made a "non-responsibility determination," it would not be allowed to submit a revised proposal,[20] thereby completely terminating the contractor's right to participate in the bid process. This undefined and unbridled power would deprive a contractor of due process, since the CO would be unilaterally taking away a contractor's opportunity to bid.

E. The Final Rule Fails to Provide A Nexus Between Violations and Ability to Perform.

The final rule fails to articulate any requirement of a "nexus" between a past violation of law and a current ability to perform the contract. Causes for debarment generally have common characteristics that involve serious misconduct such as fraud, theft or antitrust violations as they

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[18] The Society for Human Resource Management and Jackson Lewis, 1999 *Employment Practices Liability Survey* (1999).

[19] EEO Complaint Data Shortcomings, GAO/GGD-99-75, May 4, 1999. We note that the Federal Government recently settled an ancient class action complaint of discrimination against women with the payment of more than $508 million, a record setting number. *See The Washington Post*, A-1 (March 23, 2000).

[20] 65 Fed. Reg. 80255 (2000) Part 15.503 – Notifications to unsuccessful offerors.

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apply to the terms of a Government contract.[21] Short of statutory debarment authorized by Congress (Davis-Bacon Act, etc.), the FAR allows debarment for "any other cause of so serious or compelling a nature that affects the present responsibility of a Government contractor or subcontractor."[22] Since the FAR thereby already precludes contract awards in instances of egregious misconduct, the revised proposed regulations are totally unnecessary.

Without explanation or rationale, the final rule eliminates any requirement of a nexus between violations of law and a contractor's present ability to perform. Present responsibility has been the hallmark of debarment and suspension procedures. There are at least ten factors the FAR directs a debarring official to consider in deciding whether a contractor has the ability to perform the contract.[23] Past violations of employment, labor and consumer protection laws, even if finally decided to a non-appealable decision, do not necessarily give rise to a contractor's present inability to perform a specific contract. In fact, after a non-appealable final decision, any such violations are and must be remedied and are, therefore, stale as to influencing a current ability to perform. If by chance labor or employment law violations would actually interfere with a contractor's ability to perform, current regulation provides for the appropriate remedy.

F. The Final Rule Increases Paperwork and Overhead Costs for Contractors and the Government.

The final rule imposes unnecessary and extensive new paperwork and record keeping requirements. As contemplated by the regulation, contractors would have to supply information as to their legal compliance with the identifiable laws and each would have to "certify" their general legal compliance. If information is found to be inaccurate or incomplete, contractors could be exposed to criminal liability. Facing that prospect, large federal contractors will be forced to establish large networks of information to identify any and all claims that might possibly fit the reporting requirements, updated for each occasion and for each and every federal contract of any dimension.

Moreover, prime contractors would be subject to further responsibility by having to ensure that subcontractors meet a test of "satisfactory compliance" with labor, employment, tax, environmental, antitrust and consumer protection laws. Obtaining effective information to "police" its subcontractors will be costly to the prime contractor (and to the Government) and will in no way lead to good working relationships among prime and subcontractors or lead to improved performance on the federal contract.

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21 FAR .9.406-2(a)-(c).

22 FAR .9.406-2(c).

23 FAR .9.406-1.

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Either way, a prime contractor is still at the mercy of a CO's subjective interpretation. The final rule runs directly counter to previous reforms that eliminated unnecessary compliance certification and therefore should be repealed.

II. FAR PART 31 COST PRINCIPLES

The changes to Cost Principles in Part 31 are unnecessary, counter-productive, beyond the authority of the FAR Council, and therefore should be repealed.

A. The Disallowance of Costs Associated with Lawful and Protected Activities Relating to Union Organizing Destroys Government Neutrality and Conflicts with Superior Federal Law.

The final rule disallows "[c]osts incurred for activities that assist, promote, or deter unionization." With the disallowance, the Government moves from its traditional and express position of neutrality in labor relations matters to a decidedly pro-union position. Costs that help solidify and maintain union representation would be allowed; costs that help explain management's views on whether employees should vote for unions in the first place would not. The Federal Government should not exercise its procurement power to support unions. For this reason, this provision should be repealed.

Representation by a union is a statutory right under the NLRA *and equally protected is the right to refrain from representation. See* 29 U.S.C. § 157. Union organizing is protected under the NLRA *and equally protected is the right of management to express its views on representation. See* 29 U.S.C. § 158(c). The former FAR cost principles recognize this dichotomy: both the costs associated with the expression of management's lawful opinions during an organizing campaign *and* the costs associated with furthering good labor-management relations if a union wins are allowed. This is as it should be. Both are legitimate and legal customary costs of operating a business.

The *Machinists* preemption doctrine, *see* n.13 above, stands for the proposition that neither States nor the Federal Government can regulate in areas under the NLRA that Congress intended these areas to be left to the free force of economic forces. Union organizing campaigns are one such area. The proposal to disallow lawful employer campaign activities conflicts with this superior federal law.

B. Costs of Defense in Civil and Administrative Proceedings Where There is No Proof of Fraud Should Be Allowed.

The final rule disallows those costs related to "a civil or administrative proceeding [when there is] a finding that the contractor violated, or failed to comply with, a law or regulation."[24]

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[24] 65 Fed. Reg. 80258 (2000) – Part 31.205-47.

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For reasons that are undeclared and unclear, the FAR Council omitted previous reference limiting this provision to proceedings in which fraud was proved or monetary penalties imposed. This entire approach should be reconsidered as unnecessary, unworkable and unfair.

First, as described above, an "administrative proceeding" is not the termination point of any litigation. Decisions by Administrative Law Judges may be reversed within the administrative appeals process. Would the final rule disallow the costs of trial defense – when a contractor "lost" at the administrative proceeding – but allow the costs of appeal, when the contractor won? What about the instances in which the administrative proceeding at all levels results in a loss for the contractor but a court reverses? Would the defense costs be disallowed except those related to the appeal? And how would one parse this language in the instance in which numerous violations were alleged and only one proved? Is the entire defense cost not allowed?

Smaller contractors may find themselves unfairly leveraged out of a chance to defend at all because they cannot risk an adverse ALJ decision or afford an appeal.

Second, the disallowance dramatically increases costs for contractors and the Government since no contractor could afford to settle a dispute short of total vindication on final appeal. This disallowance may not add cost to the procurement side of the Government – except that DOD, GSA and NASA may find some desired contractors "disqualified" – but it will add untold costs to the budgets of DOL, NLRB, EEOC and other agencies that enforce the labor and employment laws at issue and that depend on compromise to accomplish their missions within budget.

Federal contractors make decisions about fighting, settling and appealing litigation all the time (as does the Federal Government when it is the defendant). Thus, for costs that are not deemed *per se* unallowable by the FAR cost principles now found at FAR Part 31, the significant test of allowability is and should remain one of reasonableness – whether the costs were reasonably incurred and the reasonableness of the costs themselves. The reasonableness of costs incurred as a result of employee suits depends on the facts and circumstances that gave rise to the suits as well as the expenditures in defending them.[25] Each claim of allowability must be separately reviewed.

Victory or loss should not be the standard by which reasonableness is measured. More practically, the Armed Services Board of Contract Appeals (ASBCA) has recognized:

> [W]e conclude that an ordinarily prudent person in the conduct of competitive business is often obliged to defend lawsuits brought by third-parties, some of which are frivolous and others of which have merit. In either event, the restraints

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[25] *See Northrop Worldwide Aircraft Services, Inc.*, 95-1 BCA 27,503 (ASBCA 1995).

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> or requirements imposed by generally-accepted sound business practice dictate that, except under the most extraordinary circumstances, a prudent businessman would incur legal expenses to defend a litigation and that such expenses are of the type generally recognized as ordinary and necessary for the conduct of a competitive business. Accordingly, legal expenses incurred in defending a civil litigation brought by a third-party, regardless of the outcome, are *prima facie* reasonable and are allowable, unless shown to have been incurred unreasonably or [unless reimbursement is expressly prohibited by an exclusionary cost principle.[26]

The final rule would fundamentally change federal procurement policy without a rationale as it would deprive contractors of the "reasonableness" standard.

The basic flaw with the approach of the final rule is that it forgets its antecedents. The provision on costs of legal proceedings was designed to implement the Major Fraud Act of 1988, which limited certain costs under federal contracts. *See* 18 U.S.C. § 293 (a)(3) (disallowing costs relating to "a civil judgment containing a finding of liability, or an administrative finding of liability, by reason of such violation or failure to comply, *if the charges which are the subject of the proceeding involve fraud or similar offenses.*) (Emphasis added.) The breadth of the final rule ignores its statutory underpinnings and is, most likely, beyond the authority of the FAR Council.

The final rule contains no explanation or justification for so abruptly expanding beyond the express policies of the Major Fraud Act. This may not be surprising in that there are very sound policy reasons for the limitations contained in the statute. It is not unreasonable for a contractor to defend itself against Government allegations of wrong-doing, especially as Government prosecutors constantly "push the envelope" and make unlawful today what was perfectly lawful yesterday. Part 31 of the final rule demonstrates just such a proclivity.

Even without the statutory limitations of the Major Fraud Act, this revision to cost principles is based on a faulty premise and is unnecessary and unwise. Federal contractors charge the Government the cost of performance on federal contracts, which naturally includes normal and customary overhead expenses. Federal contractors charge private commercial customers on the same basis. In the 21st Century, there can be no doubt that one of the normal and customary business expenses of any business with employees is the defense of charges and claims that some federal law was violated. The suggestion that the Federal Government should stop paying "attorneys' fees" for the defense of these claims mis-states the point. Rather, like

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[26] *Hirsch Tyler Co.*, ASBCA 20962, 76-2 BCA 12075 (ASBCA 1995). *See also, Northrop Worldwide Aircraft Services, Inc.*, 95-1 BCA 27,503 (ASBCA 1995); *Northrop Worldwide Aircraft Services, Inc.*, ASBCA 45216, 1998 ASBCA LEXIS 53 (March 26, 1998) (legal fees in unsuccessful defense resulting in $1.8 million verdict found to be reasonable).

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any other customer, the Federal Government merely pays an overhead cost that represents the general cost of doing business.

CONCLUSION

The December 20, 2000 final rule makes changes in procurement policy that contain serious flaws and errors. COs have neither the skills nor the resources to perform the tasks required. Moreover, the final rule adds remedies for alleged breaches of labor and employment laws through the procurement process that directly conflict with the exclusive jurisdiction of federal agencies and departments. Not allowing costs for defense of civil labor and employment suits runs counter to the statutory basis in the Major Fraud Act on which it stands and is unwise and unfair.

For these reasons, SHRM urges the Administration to revoke the final rule.

Thank you for this opportunity to submit comments on behalf of the members of the Society for Human Resource Management.

Respectfully submitted,

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